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No. 94-1302

In the Supreme Court of the United States

OCTOBER TERM, 1994

PETER A. CRAWFORD,
PETITIONER,

v.

CHARLES R. LAMANTIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in concluding that an individual former employee who (a) asserted no claim for improper termination, (b) is no longer a plan participant, (c) received all vested benefits when due (d) alleged no claim for vested benefits and (e) has no expectation of returning to covered employment, lacks standing under ERISA to prosecute a derivative claim on behalf of a plan.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Prior Proceedings and Factual Background. Petitioner worked as a management consultant for Arthur D. Little, Inc. ("ADL") beginning in 1981. Petitioner's Appendix at 26a ("P.A."). While he was an employee of ADL, the petitioner was a beneficiary of the Arthur D. Little Inc. Employee Stock Ownership Plan (the "ESOP"), which was formed in 1988 (P.A. 93a-95a).

The ESOP, upon its formation, obtained a $32.8 million loan from ADL to buy 546,520 "New Shares" of ADL at $60 per share (P.A. 28a). The purchased ADL shares were collateral for the loan from ADL, held in a suspense account. Each quarter, ADL contributed cash to the ESOP sufficient to pay principal and interest due on the seven-year term note (P.A. 28a). As the ESOP repaid its debt to ADL, a proportion of ADL shares in the

suspense account were freed from the collateral lien. These freed shares were then allocated, by formula, to individual accounts of participating ADL employees (P.A. 29a). In effect, ADL was agreeing to repay the loan it was making to the ESOP to fund the purchase of new shares, with the employees ultimately reaping the benefit (P.A. 29a).

In November 1988 ADL told petitioner that it was terminating his employment in connection with staff reductions due to business conditions (P.A. 50). More than five months after he was informed that his employment was being terminated, and after negotiated salary and benefit extensions expired, petitioner filed his original complaint asserting various statutory and common law claims against eleven defendants (P.A. 30a). Petitioner made no claim for wrongful termination nor did he assert that he was owed any vested benefits (P.A. 3a-4a). After he left ADL, Petitioner received various benefits that had vested under the ESOP on his behalf (P.A. 31a). Specifically, petitioner received a final distribution of vested benefits from the ESOP in the form (selected by petitioner) of a certificate for 47 shares of ADL stock and a check in the amount of $51.49 (P.A. 30a-31a). Petitioner brought no action disputing the propriety of the calculation and distribution of his vested benefits.

In 1993, while a summary judgment motion was pending, petitioner voluntarily proposed the dismissal, with prejudice, of all claims against all defendants (including, specifically, his former employer) except the three trustees of the ESOP (P.A. 30a). Petitioner then filed an amended complaint asserting two claims under the Employee Retirement Income Security Act of 1974 ("ERISA") against those three defendants in a purported class action that was, in fact, a claim on behalf of the ESOP. The amended complaint alleged that the ESOP Trustees overpaid for ADL stock and thus breached their fiduciary duty five years earlier (P.A. 3a). Again, the amended complaint made no claim that petitioner had been denied any vested benefits or that he was terminated to

deprive him of standing (P.A. 2a, 3a-4a). Petitioner sought relief only on a derivative basis, on behalf of the ESOP Plan, pursuant to ERISA §409(a), 29 U.S.C. §1109(a) (P.A.3a). The respondents renewed their motion for summary judgment.

On October 12, 1993 the District Court for the District of Massachusetts, Wolf, J., granted summary judgment (P.A. 21a) and judgment entered the same day (P.A. 22a). The District Court "note[d] that there is no claim in the amended complaint that the plaintiff is entitled to vested benefits." (P.A. 3a-4a). The District Court concluded that, because the petitioner was a former employee with no reasonable likelihood of a return to covered employment, and because he made no claim for vested benefits, he lacked standing to bring an ERISA claim on behalf of a plan under the principles enunciated in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1988).

As an alternative grounds for its decision, the District Court concluded that the petitioner failed to satisfy the requirements of Fed. R. Civ. P. 23.1 to bring a derivative claim on behalf of an ERISA plan (P.A. 16a). Specifically, the lower court concluded that the petitioner's claims "are not typical of the claims and defenses of the class." (P.A. 17a). The District Court also ruled that there were "economic antagonisms" between the petitioner and current participants in the ADL ESOP, and that, as a terminated employee, the petitioner "has a unique motive for bringing this case" that renders him atypical and inappropriate as a derivative plaintiff (P.A. 19a).

In affirming the grant of summary judgment, the Court of Appeals concluded that, even if petitioner possessed standing at the time the action was commenced under the principles of *Firestone*, "he lost this standing on account of having terminated his employment with ADL and having collected all vested benefits then due him under the ESOP." (P.A. 39a). In addition, the Court of Appeals held that the petitioner failed to demonstrate a colorable claim to vested benefits, a

conclusion amply supported by the lack of any such claim in either the original or the amended complaint (P.A. 40a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Court Of Appeals Applied The Correct Legal Standard Under ERISA In Deciding The Standing Of A Former Plan Participant

Section 502 of ERISA, 29 U.S.C. §1132, identifies persons who may undertake various types of civil actions under ERISA. Actions contemplated under the statute include, *inter alia*, individual suits "to recover benefits due" (29 U.S.C. §1132(a)(1)(B) [ERISA §502(a)(1)(B)]) and actions on behalf of a benefit plan for breach of fiduciary duty (29 U.S.C §1132(a)(2) [ERISA §502(a)(2)], §1109 [ERISA §409]). A "participant" with standing to pursue such claims, includes "employees in . . . currently covered employment. . . ." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 117 (1988). The class of "participants" also includes "former employees who have a . . . reasonable expectation of returning to covered employment" or who have "a colorable claim to vested benefits." *Id.* (Citations omitted). The Court of Appeals properly applied this standard to the undisputed record facts before it.

A. *Petitioner Was Not A Current Employee*

Five months prior to commencing his action, petitioner was informed by his employer, ADL, that his employment was being terminated (P.A. 5a). Petitioner never asserted a wrongful termination claim against ADL (P.A. 2a). Petitioner claimed that, although he had ceased receiving salary after March 24, 1989 (P.A. 30a), he remained an employee by means of an "unpaid leave of absence" for ten days after he commenced this action on May 12, 1989 (P.A. 30a-31a). Both the District Court and the Court of Appeals assumed, without deciding, that the petitioner was an employee on the date suit was commenced, although the District Court noted that this assumption was questionable:

> Further consideration of the record after the August 16, 1993 hearing indicates that this assumption may not have been appropriate, and that the evidence may be insufficient, even when considered in the light most favorable to Crawford, to permit the reasonable inference that he was an employee of ADL when he initiated this action. Defendants contend, and plaintiff does not contest, that plaintiff was an employee-at-will at ADL. In November 1988, he was informed that he "would be better off elsewhere." Defendants assert that Crawford was formally terminated, and his salary cut off on March 24, 1989. Crawford claims that prior to March 24, 1989, he requested and received an unpaid leave of absence, which was extended until May 26, 1989. Crawford concedes, however, that he did not receive a salary during this leave. Notwithstanding the facts that Crawford continued to use his office and secretary from March to May, and received a bonus and partial medical insurance during this time period, the evidence that ADL terminated Crawford and cut off his salary more strongly indicates Crawford was no longer an employee after March 24, 1989.

(P.A. 5a-6a).

Whether petitioner remained an employee the day he filed suit was a factual issue that the Court of Appeals properly by-passed in reviewing the decision of the District Court. The Court of Appeals properly noted that "'standing, since it goes to the very power of the court to act, must exist at *all stages* of the proceeding, and not merely when the action is initiated or during an initial appeal.'" (P.A. 38a) *(quoting Sommers Drug Stores Co. Employee Profit Sharing* v. *Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989) (emphasis added by Court of Appeals). *See also Safir* v. *Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984).

B. *Petitioner Had No Reasonable Prospect of a Return To Employment*

Petitioner never asserted a wrongful termination claim against his employer and, as the Court of Appeals noted, petitioner "has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. §1140" (P.A. 29a). The District Court also noted that, on the record before the court, "plaintiff is not claiming that he has a reasonable expectation of returning to employment" (P.A. 2a).

C. *Petitioner Made No Colorable Claim For Vested Benefits*

The amended complaint sought no vested benefits (P.A. 63a-88a). The District Court noted this undisputed fact: "Finally, the court notes that there is no claim in the amended complaint that the plaintiff is entitled to vested benefits." (P.A. 3a-4a). Neither the word "vested" nor the term "vested benefit" appear anywhere in the amended complaint (P.A. 63a-88a). Instead, the amended complaint stated: "This is an action under the Employee Retirement Income Security Act ("ERISA") seeking recovery of losses suffered *by the Arthur D. Little Employee Stock Ownership Plan* ("ESOP") (P.A. 63a) (emphasis added). The District Court correctly noted that recovery on behalf of a plan is not a claim for vested benefits under a plan:

> [G]enerally, a damage claim on behalf of an ERISA plan is not a benefit claim.... The recovery sought by the amended complaint will go to the ESOP. There is no clear obligation of the ESOP to pay the plaintiff any more. The recovery will not directly affect payment to him, nor is there any ascertained amount that he would be paid if he were allowed to maintain this action and prevailed.

(P.A. 11a) (citation omitted).

Here petitioner met none of the requirements to establish standing under ERISA to assert a claim for breach of fiduciary duty on behalf of a plan. Absent a claim that an employee was induced to accept benefits and forego other benefits by misrepresentations of an employer, former employees who have received a lump-sum payment of all vested benefits have no standing to assert violations of ERISA. *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991).

II. The Issues Presented By Petitioner Do Not Warrant Review In This Case

A. *The Petition Presents No Conflict Among The Circuits*

The decision below does not conflict with decisions in other circuits. Other circuits have reached the same conclusion reached by the First Circuit — former employees with no expectation of returning to covered employment and who make no claim for vested benefits are not participants under ERISA and, therefore, lack standing to bring claims on behalf of an ERISA plan. *See e.g. Shawley* v. *Bethlehem Steel Corp.*, 989 F.2d 652, 659 (3d Cir. 1993) (holding that former employees "were not participants in an ERISA plan because they had neither a colorable claim to vested benefits nor a reasonable expectation of reemployment" and therefore lacked standing); *Yancy* v. *American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) (definition of participant "excludes retirees who have accepted the payment to them of everything owed to them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.") *(quoting Joseph* v. *New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985)); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948

(6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991) ("plaintiffs were no longer participants, since they received *all benefits* that they were due under the Plan *at the time their participation in the Plan terminated*. . . ."); *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir.) *cert. denied*, 479 U.S. 916 (1986) ("Former employees who have neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits" lack standing); *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990) (participant "excludes . . . former employees who have received a lump-sum payment of their vested benefits. . . ."); *Raymond* v. *Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 81 (1993) (same).

Furthermore, petitioner's argument that the panel's decision in this case is at variance with the First Circuit's own decision in *Vartanian* v. *Monsanto*, 14 F.3d 697 (1st Cir. 1994) misreads both the decision in *Vartanian* and the decision here.[1] The facts and issues in *Vartanian* were substantially different than those raised in *Crawford* v. *LaMantia*, 34 F.3d 28 (1st Cir. 1994), a point noted in the opinion of the Crawford panel (P.A. 45a). *Id.* 34 F.3d at 33, n. 7 ("[W]e note that *Vartanian* did not involve a situation, as here, where the plaintiffs could not 'establish that they were former employees with a colorable claim to vested benefits' when faced with a motion for summary judgment. Accordingly, *Vartanian* is inapposite.") *(citation omitted)*. Specifically, in *Vartanian* the plaintiff alleged that plan administrators induced him to retire by misrepresenting their intent about future plan modifications under consideration. 14 F.3d at 699. No such element was alleged by the petitioner, who was terminated and made no claim later that the termination was improper, deceptive or illegal. *See e.g.*, P.A. 29a, *Crawford*, 34 F.3d at 30 n.2

[1] The likelihood that the panel misconstrued *Vartanian* is also diminished given that one of the two judges issuing the decision in *Crawford* was a member of the unanimous panel in *Vartanian*.

("Plaintiff has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. §1140.")

Moreover, the plaintiff in *Vartanian* sought individual benefits under §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), which creates a mechanism by which an individual participant may recover "benefits due him under the terms of his plan. . . ." 14 F.3d at 701. Petitioner sought no relief under this section (because he sought no vested benefits) but relied on §502(a)(2) of ERISA, 29 U.S.C. §1132(a)(2), which authorizes actions to recover damages on behalf *of a plan* under Section 409 of ERISA, 29 U.S.C. §1109. Such claims are derivative and fundamentally different from the individual claim made in *Vartanian*. *See infra* at 16.

Petitioner's further argument that the decision of the Court of Appeals is at odds with *Gollust* v. *Mendell*, 501 U.S. 115 (1991) incorrectly reads the decision in *Gollust*. That case addressed the narrow issue of who may initiate an action under Section 16(b) of the Securities Exchange Act of 1934 15 U.S.C. §78p(b). *Gollust* addressed no ERISA issue nor did it interpret Fed.R.Civ.P. 23.1. 501 U.S. at 120-21. *Gollust* analyzed the text of §16(b) and Congress' remedial intent in enacting the statute, holding that Congress did not intend to impose a continuous ownership requirement on plaintiffs suing under §16(b). *Id.* at 121-24. The Court did note, however, that a plaintiff in a §16(b) action must maintain some stake in the case (a requirement petitioner here fails to meet):

> This is not to say, of course, that a §16(b) action could be maintained by someone who is subsequently divested of any interest in the outcome of the litigation. . . . there would be serious constitutional doubt whether that

> plaintiff could demonstrate the standing required by Article III's case or controversy limitation on federal court jurisdiction.

Id. at 124-25. Petitioner's departure from the plan, receipt of all vested benefits, and his decision not to challenge his termination divested him "of any interest in the outcome of the litigation".

Petitioner also misplaces reliance on *Sommers Drug Stores Emp. Profit Sharing Trust* v. *Corrigan*, 883 F.2d 345 (5th Cir. 1989), as he did before the Court of Appeals, to claim that recovery by a plan may be tantamount to recovery of vested benefits. Petitioners Brief at 8. *Sommers*, however, addresses the special circumstances arising when a plan is liquidated, and all of its assets are distributed to the beneficiaries. 883 F.2d at 347, 350 ("It must be remembered that the stock was sold as a step in a planned liquidation of the Trust with distribution to the class"). The *Sommers* plaintiffs' allegation of undervaluing plan assets, combined with the liquidation and payout of the undervalued plan assets, demonstrated that the class sought vested benefits. *Id.* at 349-50. Moreover, the termination of the plan created a special circumstance appearing to leave no participants to pursue any claim except the individuals cashed out by the allegedly insufficient payments.

In contrast, petitioner neither sought vested benefits nor explained how relief for the ESOP Plan would result in any additional "vested benefits" to him. Unlike *Sommers*, there was no liquidation of the ADL ESOP and many current ESOP participants could have sought redress for any perceived harm to the ESOP Plan. (P.A. 20a). The court in *Sommers* added that "[o]n the other hand, a plaintiff who seeks recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits." 883 F.2d at 350. This characterizes precisely petitioner's claim. *See* Dis-

trict Court Memorandum and Order at 5 (P.A. 11a) ("Mr. Crawford's claim is a damage claim comparable to that asserted in *Kuntz*"). In short, *Sommers* is consistent with and supportive of the decision of the Court of Appeals.

Thus, the petition presents no evidence of tension, let alone conflict, between the decision of the Court of Appeals and comparable decisions in other circuits or with other decisions of the Supreme Court.

Finally, petitioner greatly exaggerates a perceived conflict between the Court of Appeals' decision and a District Court opinion from the Southern District of New York, *Reich* v. *Valley Nat. Bank of Arizona*, 837 F.Supp. 1259 (S.D.N.Y. 1993). The Court of Appeals noted that *Reich* was distinguishable (P.A. 60a). *Reich* addressed no standing issue; the case was brought by the Secretary of Labor. Moreover, the two cases arise in different contexts. *Reich* addressed the merits of the ultimate issue in that case after complete discovery and in the absence of any question of standing. In the present case, the decision of the Court of Appeals rested on the threshold issue of whether petitioner was a proper plaintiff. The Court of Appeals never addressed the ultimate issue of whether the ADL ESOP suffered any loss or whether the defendants' actions constituted a violation of ERISA.

Moreover, the Court of Appeal's decision is not contrary to or inconsistent with the ruling in *Reich* because it did not reach the so-called "no loss" theory ascribed to it by petitioner. The portion of the Court of Appeals' decision discussing the impact of a lower purchase price by the trustees of the ESOP arose only in response to the peculiar factual context of the petitioner's attenuated claim that, without record support or even allegations of diminished vested benefits, he could be treated as asserting a colorable claim for vested benefits. Nothing in the Court of Appeals decision concludes

that ESOP trustees who purchase stock from a party in interest for greater than adequate consideration are immune from liability under ERISA. The Court of Appeals only addressed the impact of a hypothetical lower purchase price to demonstrate that petitioner's claim of a personal interest on the record of this case was unfounded. The Court of Appeals reasoned that a lower purchase price for ADL New Shares would not have resulted in any identifiable vested benefit to this petitioner and that, at best, his claim to the contrary was speculative and unsupported by the record:

> We acknowledge that because the ESOP note would have been for less money, the formula by which the encumbered shares were to be released to qualified participants *might* have altered the rate of release of stock one way or the other. The District Court was in no position to know this, however, since plaintiff failed to argue this point and further failed to provide it with the ESOP agreement. Accordingly, there is no basis for the court to infer standing from a putative accelerated release of stock.

(P.A. 44a)

Furthermore, even if a conflict were perceived between the Court of Appeals decision and *Reich*, this would be an inappropriate case to examine the so-called "no loss" theory. The petitioner's inability to satisfy well-established standing prerequisites, his failure even to include the ESOP plan itself in the record, and his palpable inadequacy as a derivative plaintiff on behalf of the ESOP correctly led to summary judgment. The putative "no-loss" theory was never developed on the record, was not necessary to the Court of Appeals' decision and was, at best, tangential to the Court's reasoning.

The other Court of Appeals decision that petitioner cites is a 1984 opinion from the Fifth Circuit, *Donovan* v. *Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied* 467 U.S.

1251 (1984). The *Donovan* decision rested on close analysis of particular facts surrounding a purchase, by ESOP trustees, of employer stock. The legal principles informing that analysis on the merits are simply not addressed by the Court of Appeals decision, which reviewed only petitioner's standing claims on the basis of his allegations and the summary judgment record. The only other cases petitioner cites are a number of consistent District Court decisions that addressed payment by ERISA trustees of more than adequate consideration (Petitioner's Brief at 14-15).

Given the lack of conflict on the legal issues actually addressed and the limits of the record appendix before the Court of Appeals, it would be premature for this Court to grant review to resolve a supposed conflict between the First Circuit and a decision by a District Court in a different circuit.

B. *The Petition Does Not Present A Question Of Recurring Importance*

There is no reason for this Court to accept this case for review. This case presents the highly unusual and "atypical" circumstance of a claim brought on behalf of an ESOP plan by someone not a participant in that plan, who does not challenge his employment termination and who makes no claim for unpaid, vested benefits. The petitioner, long ago terminated by his employer, sought to "vindicate" harm he perceived to a pension plan in which he had no economic stake. Indeed, petitioner has economic interests adverse and antagonistic to some of the ESOP participants he sought to champion (P.A. 18a). At the same time, none of the hundreds of actual and current plan participants, a body of highly educated management and technical consultants, saw fit to join or support petitioner (P.A. 19a). The likelihood that this situation would be repeated elsewhere is quite remote.

There is no compelling reason why a former participant purporting to claim on behalf of a plan in which he no longer participates (and from which he has received all vested benefits) should be afforded a right to sue. ERISA established a broad and diverse panoply of remedies, including civil and criminal proceedings available to the government, *e.g.* 29 U.S.C. §1109 [ERISA §409], 29 U.S.C. §§1132 (a)(2), (a)(4), (a)(5) [ERISA §§502(a)(2), (a)(4), (a)(5)], civil actions available to current participants and beneficiaries *e.g.* 29 U.S.C. §1132 (a)(3) [ERISA §502(a)(3)] and civil actions available to plan fiduciaries *e.g. id.* and to the States. 29 U.S.C. §1132 (a)(7) [ERISA §502(a)(7)]. Extending this comprehensive statutory enforcement scheme to former participants who have received all vested benefits, make no claim for wrongful or improper termination and who seek to act on behalf of an ongoing plan with many current, financially interested participants, adds nothing meaningful. To suppose that a viable, important claim might escape the existing enforcement mechanisms ascribes no interest to the persons naturally most interested in the affairs of the plan — the Secretary of Labor, the plan fiduciaries and the plan participants themselves. Deputizing former plan participants, situated like petitioner, to bring claims would address a non-existing "problem" while enhancing the likelihood of officious intermeddling from discontented former employees. Petitioner's claim, as an example, has drawn resources from the ESOP plan itself throughout it's six-year litigation life, and advocates a position "antagonistic" to the economic interest of some ESOP participants without support from a single current plan participant (P.A. 18a-20a). In short, petitioner's own case is compelling reason against extending standing under ERISA to former employees who have received all vested benefits and who make no claim of a reasonable likelihood of returning to covered employment.

C. *This Petition Raises No Misapplication Of Any Federal Rule*

The rules governing the standing of *former* ESOP participants have been well developed. Without a claim that an employee was induced to accept benefits and forego later benefits by misrepresentations of an employer, former employees who have received a lump-sum payment of all vested benefits from an ongoing plan have no standing to assert violations of ERISA. *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991). The courts have anchored ERISA standing to the conventional and reasonable meaning of statutory terms such as vested benefits. *See Firestone Tire & Rubber Co.*, 489 U.S. at 117-118. The Court of Appeals followed this well-established approach here.

The petition advocates a new rule which, if adopted, would obscure, and essentially destroy, any meaningful limit to ERISA standing. The petitioner has proposed enlarging the term "vested benefits" to encompass any recovery by an ESOP Plan that *might* (through a trial court's discretionary exercise of equitable powers or in any other conceivable manner) result in future benefits flowing to a former participant. Such claims would, by nature, be contingent and premised on highly speculative, case-specific supposition. Claims for vested benefits are the opposite in nature. "A benefit is not vested unless it is unconditional and legally enforceable." *Shawley* v. *Bethlehem Steel Corp.*, 989 F.2d 652, 656 (3d Cir. 1993) (citing 29 U.S.C. §1002(19)). As the *Shawley* court went on to say "[a] contingent claim for future benefits does not satisfy the dictates of *Firestone.*" *Id.* at 657.[2]

[2] *See also* 26 C.F.R. §1.411(a)-4(a)(1987) (nonforfeitable, or vested, accrued benefits are those benefits to which a participant has an unconditional right).

By abrogating the inherent limit of the "vested benefits" standard of ERISA standing, petitioner's proposed rule would expand ERISA claims to any former plan participant. This would include plaintiffs, such as petitioner, who have taken all of their benefits, moved on to new employment and seek no return to their former employment. Such a rule would be obnoxious to public policy because ERISA claims based on alleged breach of fiduciary duty are derivative in nature, and necessarily affect the rights of current plan participants of the plan on whose behalf such claims are brought. *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1984)(stating that it was "Congress' intent that actions for breach of fiduciary duty [under ERISA] be brought in a representative capacity on behalf of the plan as a whole."); *Thornton* v. *Evans*, 692 F.2d 1064, 1079 n.36 (7th Cir. 1982) (holding that because ERISA claims on behalf of a plan "touch the interest of every beneficiary [] [w]e must therefore determine whether plaintiffs in this action have satisfied the prerequisites of Rule 23.1 to the maintenance of a derivative action."); *Mertens* v. *Kaiser Steel Retirement Plan*, 744 F.Supp. 917 (N.D. Cal. 1990), *aff'd sub nom*, *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (noting that courts must balance the representational nature of ERISA claims with Congress' intent to afford a remedy for breaches of fiduciary duty and "must reconcile the preclusive effect of representative actions with that animating purpose." *Id.* at 920.).

This preclusive effect mandates some outer limit on standing. The Court's articulation of the limits of "participant" in *Firestone*, and subsequent standing interpretations in many decisions by the Court of Appeals, based on that definition, are sound. The expansion petitioner seeks would afford disconsolate former employees a potent *in terrorem* litigation weapon, without countervailing benefit in enforcing the principles of ERISA. To the contrary, petitioner's approach would increase costs and risks to employers, plan fiduciaries and participants, discouraging the establishment of plans encouraged by ERISA.

D. *Summary Judgment Was Proper In This Case Regardless Of The Resolution Of The Issues Presented*

The District Court also found, independent of the resolution of the issues presented by the petitioner, that petitioner would not be an adequate or typical plaintiff to assert derivative or representational claims on behalf of an ERISA plan or plan participants. Specifically, the trial court concluded that the petitioner's claims "are not typical of the claims and defenses of the class." (P.A. 17a). The District Court also ruled that there were "economic antagonisms" between the petitioner and current participants in the ADL ESOP, and that, as a terminated employee, the petitioner "has a unique motive for bringing this case" that renders him atypical and inappropriate as a derivative plaintiff (P.A. 19a).

This alternative, but sufficient, ground for summary judgment was not addressed by the Court of Appeals, but remains an independent basis for denying the petition. As the District Court made clear, more than one reason made summary judgment appropriate in this case (P.A. 5a-6a, 15a, 16a-20a).

CONCLUSION

Crawford's petition should be denied.

Respectfully submitted,

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